Spoliation Sanctions in the Court of Federal Claims

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I. Introduction

Discovery sanctions related to the review and production of electronically stored information ("ESI"), have increased dramatically in recent years.[1] Sanctions against counsel, still an extraordinary remedy, have also increased since 2004.[2] The scope, complexity, and cost of electronic discovery presents a substantial project management challenge for attorneys, and such discovery "disaster" cases as *Qualcomm Inc. v. Broadcom Corp.*[3] highlight the practical consequences of discovery rule violations.[4] The rise in discovery sanctions has led to calls for further refinement of the Federal Rules of Civil Procedure and for greater clarity and uniformity in the legal standards applicable to sanctions.[5]

This essay summarizes Court of Federal Claims ("CFC") cases that have addressed discovery misconduct. In recent years, CFC judges have expressed divergent views regarding the *mens rea* required to impose sanctions for spoliation. In considering requests for sanctions by both the government and private litigants, CFC judges have exercised their judicial power

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[1] *See generally* Dan H. Willoughby, Jr., et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 (2010) (cataloging and discussing federal e-discovery sanctions).

[2] *Id.* at 815-16.

[3] No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *vacated in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

[4] *See also, e.g., DL v. District of Columbia*, __ F.R.D. __, 2011 WL 1770468, at *6-*10 (D.D.C. May 9, 2011) (ruling that government's privilege claims and discovery objections were waived in response to repeated, flagrant noncompliance with discovery orders); *Pension Comm. v. Banc of Am. Sec. LLC*, 685 F. Supp. 2d 456, 496-97 (S.D.N.Y. 2010).

[5] *See, e.g.*, Willoughby et al., *supra* note 1, at 793 & n.18 (collecting examples).

under the discovery rules and their inherent authority to control the judicial process cautiously, and have crafted misconduct remedies that are tailored to the specific conduct at issue.

II. The CFC's Culpability Standard for Spoliation Sanctions

There is no uniform national standard governing the imposition of sanctions for spoliation, which has been defined as "the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending, or reasonably foreseeable, litigation."[6] Courts differ widely by circuit with regard to the level of culpability required and whether and how prejudicial the destruction of evidence must be to warrant sanctions. Recently, the District of Maryland, in *Victor Stanley, Inc. v. Creative Pipe, Inc.*,[7] attempted a circuit-by-circuit summary of spoliation scienter requirements.

The Federal Circuit "applies the law of the regional circuit from which the case arose" when evaluating sanction orders.[8] As CFC judges have observed, the Federal Circuit "has not definitively addressed whether a finding of bad faith is required before a court can find spoliation or impose an adverse inference or other sanction."[9] Consequently, the CFC has been left to its own devices, with judges differing on whether spoliation requires that a party act in "bad faith," if sanctions may be imposed for mere negligence, or whether a sliding scale should apply based on the harshness of the penalty sought. In *Columbia First Bank, FSB v. United States*,[10] Judge Hewitt concluded that the law of both the Federal Circuit and the CFC requires a showing of bad

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[6] *See, e.g. Consolidated Edison Co. v. United States*, 90 Fed. Cl. 228, 254 (2009) (internal citations omitted).

[7] 269 F.R.D. 497, 517 & n.27, 542-53 (D. Md. 2010).

[8] *Monsanto Co. v. Ralph*, 382 F.3d 1374, 1380 (Fed. Cir. 2004).

[9] *Consolidated Edison Co. of N.Y., Inc. v. United States*, 90 Fed. Cl. 228, 255 n.20 (2009).

[10] 54 Fed. Cl. 693 (2002) [*hereinafter Columbia First Bank I*].

faith before the court can impose sanctions for spoliation of evidence.[11] The court relied upon the Federal Circuit's holding in *Eaton Corp. v. Appliance Valves Corp.*[12] to support its finding of a bad faith requirement, reasoning that, although it was a patent case and applied Seventh Circuit law, the CFC had followed *Eaton* in two subsequent decisions and should continue to adhere to that precedent.[13]

Judge Allegra rejected a "bad faith" requirement in *United Medical Supply Co., Inc. v. United States*,[14] reasoning that *Eaton* is not binding and that its progeny in the CFC either proceeded erroneously from the assumption that it was or relied upon other cases that did so.[15] In *United Medical Supply*, the court noted that the Federal Circuit had upheld spoliation sanctions without a finding of bad faith in other cases both before and after *Eaton*, such as *Sensonics v. Aerosonic Corp.*[16] Noting that *Sensonics*, *Eaton*, and all other Federal Circuit precedent addressing spoliation sanctions were patent cases applying the law of another circuit,

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[11] *Id.* at 703-04 (declining to dismiss plaintiff's case in the absence of evidence that plaintiff had acted in bad faith when failing to preserve critical documents); *see also Columbia First Bank, FSB v. United States*, 58 Fed. Cl. 54, 56 (2003) [*hereinafter Columbia First Bank II*] (refusing likewise to impose an adverse inference due to plaintiff's negligent destruction of documents).

[12] 790 F.2d 874, 878 (Fed. Cir. 1986).

[13] *Columbia First Bank I*, 54 Fed. Cl. at 703 (citing *Slattery v. United States*, 46 Fed. Cl. 402, 405 (2000) (Smith, C.J.), and *Hardwick Bros. Co. II v. United States*, 36 Fed. Cl. 347, 417 (1996) (Robinson, J.), *aff'd on other grounds*, 168 F.3d 1322 (Fed. Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999)).

[14] 77 Fed. Cl. 257 (2007).

[15] *Id.* at 265-67.

[16] 81 F.3d 1566, 1572-73 (Fed. Cir. 1996); *see also United Medical Supply*, 77 Fed. Cl. at 265-66. Judge Allegra noted the tension between *Eaton* and *Sensonics* in an earlier decision, *Klump v. United States*, 54 Fed. Cl. 167, 175 n.13 (2002), but declined to address the issue there because "the application of an adverse inference would make no difference in the ultimate result reached here."

Judge Allegra deemed the *mens rea* issue an open question in the CFC.[17] Following a detailed survey of the law and the principles underlying the spoliation remedy generally, the court concluded that no bad faith showing was required to justify sanctions.[18] The court reasoned that there was little purpose for a general duty to preserve evidence without a robust means of punishing spoliation and requiring a showing of bad faith undermined the chief policy arguments for judicial sanctions.[19]

The Federal Circuit has acknowledged the absence of a clear scienter requirement for the imposition of spoliation sanctions, but has not yet resolved the issue.[20] Recent CFC decisions have noted the divergence of views, citing both *United Medical Supply* and *Columbia First Bank*.[21] In the absence of clear Federal Circuit guidance, CFC judges have applied a practical proportionality approach. For example, in *Cencast Services, L.P. v. United States*,[22] Judge George Miller, noting that the Federal Circuit "has not yet decided what level of culpability the alleged spoliator must have exhibited" reasoned that "[u]nder any applicable test, the level of culpability is relevant to the propriety of a sanction."[23] Declining to address the relevant standard, Judge Miller has concluded that because the evidence indicated no more than

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[17] 77 Fed. Cl. at 266.

[18] *Id.* at 267-68.

[19] *Id.* at 268-69.

[20] *See Jandreu v. Nicholson*, 492 F.3d 1372, 1375-76 (Fed. Cir. 2007) and *Kirkendall v. Department of the Army*, 573 F.3d 1318, 1326-27 & n.6 (Fed. Cir. 2009) ("[T]he *Eaton* case is not relevant to the test this court sets as a requirement for sanctions for discovery abuse at the [Merit Systems Protection Board]. But we need not fashion a test for this circuit . . . . because the board has already set its own test . . . .") (footnote omitted).

[21] *See, e.g.*, *Pitney Bowes Gov't Solutions, Inc. v. United States*, 93 Fed. Cl. 327, 336 (2010).

[22] 94 Fed. Cl. 425 (2010).

[23] *Id.* at 444.

negligence, "[t]he adverse inference requested by plaintiffs would be disproportionate to the offense."[24]

III. Sources of Sanction Authority

Like other courts, the CFC has identified two sources of authority when imposing sanctions for discovery misconduct. First, RCFC 37—modeled on its counterpart, Fed. R. Civ. P. 37—permits a court to impose sanctions for conduct that violates a court order or otherwise "disrupts the court's discovery regime."[25] Second, as the Supreme Court has recognized, courts have an inherent power to impose sanctions in connection with their authority to redress abuses of the judicial process.[26] Although it is not an Article III court, case law confirms that the CFC also has this inherent power to protect the integrity of the judicial process.[27] While the policy imperatives underlying these distinct sources of authority are essentially the same, judges on the CFC have seldom addressed the practical distinctions between them. Indeed, in some cases the court does not identify the source of its authority to impose sanctions, simply concluding that sanctions are inappropriate for other reasons.[28]

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[24] *Id.* at 444 & n.22.

[25] *United Medical Supply*, 77 Fed. Cl. at 264.

[26] *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991).

[27] *See United Medical Supply Co., Inc. v. United States*, 77 Fed. Cl. 257, 264 & n.6 (2007) (gathering cases).

[28] *See, e.g., Cencast Services*, 94 Fed. Cl. at 444; *Pitney Bowes Gov't Solutions, Inc. v. United States*, 94 Fed. Cl. 1, 7-9 (2010). In a separate series of cases, the CFC has dismissed spoliation tort claims without consideration after determining that the court lacked subject matter jurisdiction over such claims. *See, e.g., Mike's Contracting, LLC v. United States*, 92 Fed. Cl. 302, 310 (2010); *Stevens v. United States*, No. 09-623C, 2010 WL 147918, at *1 (Fed. Cl. Jan. 7, 2010); *see also Werderitsh v. Sec'y of Health & Human Servs.*, No. 99-319V, 2005 WL 3320041, at *19 n.51 (Fed. Cl. Nov. 10, 2005) (noting that sanctions were inappropriate where the petitioner had not shown that she sought discovery or that the government had failed to respond to a discovery order, and where some information was protected by statute).

This issue would have little import if the scope and standard for applying the court's inherent authority were the same as its statutory powers under Rule 37. As Judge Allegra noted in *United Medical Supply* when addressing the *mens rea* issue discussed above, however, some case law suggests that the standard for imposing sanctions under Rule 37 may differ from that applicable under the court's inherent authority.[29] More importantly, while some courts have held that Rule 37 is identical in scope to the court's inherent authority, even when the spoliation occurred before the court issued a discovery order, the majority of courts to address the scope of authority under Rule 37 have concluded that it is narrower than the court's inherent judicial power to impose sanctions for discovery misconduct.[30] Although Judge Allegra concluded based on Rule 37's language that "willfulness . . . factors only into the selection of the sanction" in that context,[31] the scope of the court's inherent power poses a more difficult issue. In *United Medical Supply*, the court ultimately concluded that Rule 37 and the court's inherent power to sanction shared a common culpability standard—noting that a more lenient standard under the court's inherent authority might encourage a "race to the shredder" if litigants felt they might be held to a lower standard if they destroyed evidence before the court established a discovery regime.[32] Nevertheless, the court concluded that courts "ought to be cautious in exercising their inherent authority."[33]

Several cases following *United Medical Supply* have considered the application of sanctions under the court's inherent authority, but have not expressly addressed the scope of that

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[29] 77 Fed. Cl. at 267.

[30] *Id.* at 268 (gathering cases).

[31] *Id.* at 268.

[32] *Id.* at 269 & n.23.

[33] *Id.* at 270.

power—with regard to *mens rea* or otherwise—and instead have denied the proposed sanctions on other grounds. For example, in *Morse Diesel International v. United States*,[34] the court noted that it might impose sanctions under its inherent judicial authority, but declined to address the nature or scope of that power after concluding that the evidence at issue was not relevant to the plaintiff's case, and determined that the motion itself was untimely, it did not address which basis of authority applied, or even whether the distinction was relevant.[35] Likewise, in *Consolidated Edison Co. of New York, Inc. v. United States*,[36] noted that "[t]he inherent power of courts is broad, but must be exercised by judges cautiously," concluding that the facts at issue were not severe enough to warrant a sanction without addressing the proper scope of that authority.[37] In other cases, the court has declined to impose sanctions without expressly addressing the applicable source of authority.[38]

IV. Sanctions Imposed by the CFC

Given the concerns regarding expansive exercises of inherent judicial power to impose sanctions, it is perhaps unsurprising that the CFC has very seldom imposed sanctions under its inherent authority. Based on our review of published decisional law, it appears that the CFC has imposed sanctions only twice in the past decade: in *United Medical Supply*, discussed above,

[34] 81 Fed. Cl. 220 (2008).

[35] *Id.* at 221-22.

[36] 90 Fed. Cl. 228 (2009).

[37] *Id.* at 254-56, 262-63.

[38] *Cencast Servs.*, 94 Fed. Cl. at 444-45 (concluding that sanctions would be disproportionate the offense); *Pitney Bowes Gov't Solutions v. United States*, 94 Fed. Cl. 1, 9 (2010) (finding that, notwithstanding the improper destruction of relevant documents, spoliation was no longer an issue due to the location of appropriate backup files).

and in *Multiservice Joint Venture, LLC v. United States*.[39] There, "the Court [was] satisfied that an irregularity occurred for which Plaintiff should be held accountable," referring to the apparent alteration of an exhibit by plaintiff's counsel to replace annotated pages with "clean" pages during a break in a deposition.[40] When asked about counterclaims made by the government, the witness had made several notations on a copy of the Answer. After returning from a break in the deposition, defense counsel noted that the last two pages of the exhibit, on which the witness had marked "no info" next to several paragraphs, had been replaced with unmarked pages.[41] Since defense counsel was not in the room when the apparent alteration occurred, "the Court place[d] responsibility squarely on Plaintiff and Plaintiff's counsel to provide an explanation."[42] They proved unwilling to do so, and testimony by the court reporter and another witness suggested that plaintiff's counsel had removed and replaced the relevant pages. The court concluded that "[p]laintiff's conduct is an affront to the Court, and cannot escape unpunished,"[43] indicating that it had power to impose sanctions under *both* Rule 37 and its inherent judicial authority, as well as 28 U.S.C. § 1927.[44] Noting that an adverse inference would be difficult to apply without knowing the content of the witness's annotations, the court ruled instead that the witness would be barred from testifying altogether unless called by the government.[45] The court further

[39] 85 Fed. Cl. 106 (2008).
[40] *Id.* at 107, 109.
[41] *Id.*
[42] *Id.* at 113.
[43] *Id.* at 113-14.
[44] *Id.* at 112.
[45] *Id.* at 114.

sanctioned plaintiff's counsel, ordering her to pay the government's costs for the deposition and in preparing the sanctions motion personally.[46]

As the court noted in *Multiservice Joint Venture*, it is well established that "the oldest and most venerable remedy" for spoliation is an adverse inference applied against the culpable party in which the finder of fact may presume that the destroyed evidence was unfavorable to that party.[47] Rule 37 identifies other potential remedies, up to and including the imposition of default judgment against the culpable party. Nevertheless, the CFC has taken a very restrained approach to the imposition of sanctions, even in cases involving more egregious fact patterns. Only in the *Multiservice Joint Venture* did the court sanction counsel personally. And the primary remedy applied in both of these decisions was not default judgment or even the more "traditional" adverse inference, but rather a more limited remedy. In addition, these decisions appear to have limited the willingness of courts to impose sanctions in less egregious situations. For example, in *Consolidated Edison*, the court referenced *United Medical Supply*, noting that, despite the more egregious conduct at issue in that case, "the sanctions imposed did not include an adverse inference sanction, as is requested by the defendant in this case."[48]

V. Conclusion

The CFC has examined the issue of spoliation repeatedly in recent years, and the growth of electronic discovery disputes suggests that it will continue to be presented with discovery misconduct allegations and requests for sanctions from public and private litigants. Although the court has expressed divergent views regarding the precise level of culpability required to impose

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[46] *Id.*

[47] Jonathan Judge, *Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort*, 2001 WIS. L. REV. 441, 444 (2001).

[48] 90 Fed. Cl. at 255-56, 263 (citing *United Medical Supply*, 77 Fed. Cl. at 274-75).

sanctions, its decisional law reflects a careful, practical perspective regarding the application of remedies that are appropriately tailored to the specific conduct at issue. While the CFC has tended to give litigants the benefit of the doubt when considering sanctions, in light of the increasing significance electronic and other discovery disputes, the CFC and the Federal Circuit are likely to have opportunities to clarify this area of the law in the future.

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